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No. 84-2008

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

READING COMPANY
AND
CENTRAL JERSEY INDUSTRIES, INC.,
Petitioners,

v.

JOSEPHINE SCHWEITZER, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Were the present claims of railroad workers who were exposed to asbestos before their railroad-employer was reorganized, but who did not manifest any injury until after the consummation date of the reorganization, discharged in the reorganization proceeding?

DESIGNATION OF CORPORATE RELATIONSHIPS

Consolidated Rail Corporation, the only respondent that is a corporation, is not owned by any parent corporation. Consolidated Rail Corporation has an ownership interest in the following companies: Akron & Barberton Belt Railroad Company; Albany Port Railroad Company; Belt Railway Company of Chicago; Calumet Western Railway Company; Chicago & Western Indiana Railroad Company; Fruit Growers Express Company; Indiana Harbor Belt Railroad Company; Lakefront Dock & Railroad Terminal Company; Monongahela Railway Company; Nicholas, Fayette & Greenbrier Railroad Company; Peoria & Pekin Union Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; and Trailer Train Company. Consolidated Rail Corporation does not have an ownership interest in any other company, except for its wholly-owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit that this Court should deny the petition for a writ of certiorari. The petition seeks review of the opinion issued in this case by the United States Court of Appeals for the Third Circuit. The opinion is reported at 758 F.2d 936.

STATEMENT

The individual respondents are former railroad workers, spouses of former railroad workers, or personal representatives of deceased former railroad workers who were exposed to asbestos while employed by the Reading Company ("Reading") or the Central Railroad Company of New Jersey ("CNJ") during the period when Reading and CNJ operated railroads. That period ended on April 1, 1976, when, pursuant to Congress' mandate, Reading and CNJ transferred substantially all of their railroad operating properties to the newly formed Consolidated Rail

Corporation ("Conrail"). Several years before that transfer occurred, Reading and CNJ had each filed for reorganization under Section 77 of the now-repealed Bankruptcy Act of 1898.[1] Employee personal injury claims asserted during the reorganization proceedings were paid in full in cash under both the Reading and CNJ reorganization plans. Neither Reading nor CNJ gave any notice to its employees that it would consider claims for future injuries resulting from their railroad employment to be barred if not asserted during the reorganization proceedings. Indeed, employees with personal injury claims were exempt from the requirement of filing proofs of claims under specific orders entered in each reorganization.

CNJ's reorganization proceedings continued until September 14, 1979, and Reading's continued until December 31, 1980. Neither Reading nor CNJ was ever dissolved. Rather, as of their respective consummation dates, Reading and CNJ, which changed its name to Central Jersey Industries, Inc. ("CJI"), amended their corporate charters and emerged from reorganization with considerable assets, including non-rail properties, substantial federal income tax net operating loss carryforwards, and an entitlement to receive the value of the properties transferred to Conrail (since received in the form of cash payments).

After the consummation of the reorganizations, a number of former Reading and CNJ railroad employees manifested their first symptoms of asbestos-related diseases. They have averred that their diseases were caused, at least in part, by their exposure to asbestos during their employment by Reading and CNJ before the consummation dates. Beginning in 1981, the employees

1. The Bankruptcy Act of 1898 has since been replaced prospectively by the Bankruptcy Reform Act of 1978 ("Bankruptcy Code"), which went into effect on October 1, 1979, and applies to bankruptcy cases filed on or after that date.

instituted lawsuits against their former employers and Conrail, in which they asserted claims under the Federal Employers' Liability Act ("F.E.L.A."), 45 U.S.C. §§51-60, and related statutes. Although some of the employees had worked for Conrail as well as Reading or CNJ, several had never worked for Conrail.

Reading filed motions to dismiss eight cases filed against it in the United States District Court for the Eastern District of Pennsylvania. Conrail and the plaintiffs opposed the motions. The motions were transferred for decision to the Honorable J. William Ditter, Jr., who had presided over Reading's reorganization. Despite the plaintiffs' assertions that they had not manifested symptoms of asbestos-related disease until after the consummation date of Reading's reorganization, and despite Reading's admitted failure to notify its former employees that it would contend that any claims for occupational injuries that might develop in the future had been discharged in the reorganization proceeding, Judge Ditter held that the claims had been discharged by the consummation order entered in Reading's reorganization proceeding.

CJI accomplished the same result through a different procedural route. CJI sought and received from the Honorable Clarkson S. Fisher of the United States District Court for the District of New Jersey orders enjoining former CNJ employees from prosecuting the lawsuits for asbestos-related injuries that they had instituted against CJI and Conrail in a New Jersey state court and the United States District Court for the Eastern District of Pennsylvania. The plaintiffs in the CJI lawsuits, like the plaintiffs in the Reading lawsuits, averred that they had first manifested symptoms of asbestos-related injuries after the consummation date of their former employer's reorganization. CNJ, like Reading, had not notified its former employees that it would consider claims for injuries resulting from their railroad employment to have

been discharged in the reorganization even though the employees had not manifested any symptoms of such injuries as of the consummation date of the reorganization.

The Reading plaintiffs, the CJI plaintiffs, and Conrail appealed Judge Ditter's and Judge Fischer's orders to the United States Court of Appeals for the Third Circuit. The Court of Appeals reversed, holding that a claim in a reorganization proceeding must be founded on a substantive obligation created by either state or federal law, that the plaintiffs' F.E.L.A. causes of action did not come into being until the plaintiffs manifested symptoms of asbestos-related injuries, and that, accordingly, the plaintiffs did not have dischargeable claims under Section 77 of the Bankruptcy Act as of the consummation dates of the Reading and CJI reorganizations. Since the claims were not dischargeable, the consummation orders did not bar their assertion against Reading and CJI, the reorganized companies. The Court of Appeals remanded the cases for further proceedings.

REASONS FOR DENYING THE PETITION

The United States Court of Appeals for the Third Circuit decided only a narrow question in this case. The decision does not have the far-reaching consequences that petitioners (and others supporting their request for review) would ascribe to it; the decision is not in conflict with the decision of any other court of appeals or with any decision of this Court; and the decision is manifestly correct.

A. The Court of Appeals Decided a Narrow Question Concerning the Interpretation of Section 77 of the Now-Repealed Bankruptcy Act.

What the Court of Appeals for the Third Circuit decided in this case was that consummation orders in two railroad reorganizations, which discharged Reading and

CNJ from "all obligations, debts, liabilities and claims" as of the applicable consummation dates of their reorganizations, did not preclude former employees who had been exposed to asbestos while working for those two railroads from asserting F.E.L.A. claims for asbestos-related injuries that did not become manifest until after the consummation dates. The Court of Appeals rendered this decision in the context of a situation where no attempt had been made during the course of reorganization proceedings to deal with these potential future claims or to give notice to the potential claimants.

In its decision, the Court of Appeals held (1) that "as a matter of federal law, F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury" (Pet. App. 14a) and (2) that these railroad employees did not have "interests" within the meaning of Section 77(b) of the Bankruptcy Act before injury manifested itself (Pet. App. 15a). Hence, the Court of Appeals held that the Reading and CNJ consummation orders did not discharge the claims of these workers.

What the Court of Appeals for the Third Circuit expressly did *not* hold was that reorganization courts lack power to deal with potential future claims of this nature. To the contrary, the Court of Appeals specifically stated:

> Because this case does not present the question of what provision in a reorganization plan, if any, could be made for future claims such as these (*e.g.*, reserve or sinking funds, insurance, annuities, etc.) we do not address that issue here. (Pet. App. 17a n.1)

Thus, this case does not present the issue that petitioners seek to present in the first of their two "Questions Presented," namely:

> 1. Whether a reorganization court has *the power* to deal with and provide for latent future

> asbestos-related toxic tort claims as part of a reorganization of a debtor corporation under Section 77 of the Bankruptcy Act? (Emphasis supplied.)

The reorganization courts in this case did not purport to "deal with and provide for latent future asbestos-related toxic tort claims as part of a reorganization," and the Court of Appeals did not rule on the question of whether a reorganization court has the power to do so.

Nor does this case present the second issue raised by petitioners, namely:

> 2. Whether, assuming that a reorganization court has such authority, the court may bar such future claims, where the rail operations out of which such claims arose are, during the course of the reorganization, transferred to a solvent successor railroad?

The Court of Appeals did not rule that Conrail or any other entity was a "successor railroad"; the Court of Appeals did not decide whether the existence of a "successor railroad" would, in any event, relieve the "predecessor railroad" of liability; and the Court of Appeals quite properly rebuffed petitioners' efforts to raise the speculative issue set forth in the second question since neither Judge Ditter nor Judge Fisher had decided that issue in the courts below.[2]

What the Court of Appeals held was simply that the claims of former Reading and CNJ employees for

2. The issue of what liability, if any, Conrail may have to persons who have developed injuries from their exposure to asbestos during their employment by railroads that have been reorganized in bankruptcy is the subject of a declaratory judgment action in the Special Court, Regional Rail Reorganization Act of 1973 (*Consolidated Rail Corporation v. The Reading Company*, Civil Action No. 82-29). That action has been stayed pending a final decision in this case.

asbestos-related injuries were not barred by reorganization plans and consummation orders that did not make provision for such claims.

B. The Court of Appeals Decision Does Not Have the Far-Reaching Consequences Petitioners Would Ascribe to It.

Nowhere in its decision did the Court of Appeals purport to deny reorganization courts the "power to deal with and provide for latent future asbestos-related toxic tort claims as part of a reorganization." During the CNJ and Reading reorganizations, there was no attempt to deal with or provide for latent future asbestos-related toxic tort claims, and the Court of Appeals opinion does not even discuss what the reorganization courts could have done prospectively to deal with such claims.

Petitioners misstate the facts when they assert that the Court of Appeals "concluded that the reorganization courts lacked the power to discharge plaintiffs' claims" (Pet. 6), that "[t]he decision of the Court of Appeals for the Third Circuit . . . holds that a reorganization court lacks the power to fashion a remedy for future latent tort claimants" (Pet. 12-13) and that, if the decision below is allowed to stand, reorganization courts will be "powerless to protect the reorganized corporation from large and uncertain future toxic tort claims" (Pet. 14).[3] The Court

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3. Petitioners reiterate these misstatements elsewhere, claiming that "[t]his case presents important questions concerning the power of a reorganization court to deal with claims attributable to exposure to occupational diseases, such as asbestosis and mesothelioma, that are characterized by long latency periods" (Pet. 7), that the Court of Appeals held "that a reorganization court is powerless to deal with the rights of latent future claimants arising out of preconsummation tortious conduct by the debtor" (Pet. 8), that the Court of Appeals decision is a "holding that a reorganization court lacks the power to deal with the claims of employees and former employees of the debtor who have suffered only subclinical injury from occupational exposure to asbestos" (Pet. 8-9), that the

of Appeals did not have before it, nor did it address, the question of a reorganization court's power to deal with future latent tort claims in reorganization proceedings. Indeed, the word "power" appears only once in the entire opinion of the Court of Appeals — and then only when the Court refers to the district court's equitable reservation of jurisdiction (Pet. App. 9a). And, as noted above, the Court of Appeals explicitly declined to address the question of what, if any, provisions could be made in a reorganization plan for future claims such as these.

Furthermore, the Reading and CNJ reorganizations took place under the Bankruptcy Act of 1898, and it was that now-repealed statute that the Court of Appeals interpreted. Reorganization proceedings instituted on or after October 1, 1979, such as the present Johns-Manville Corporation reorganization referred to by petitioners, are governed by the Bankruptcy Code, a statute that the Court of Appeals did not interpret and that contains a definition of claim that differs from and is broader than the definition in Section 77 of the Bankruptcy Act. *See* 11 U.S.C. §101; H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977); S. Rep. No. 989, 95th Cong., 2nd Sess. 21 (1978).

Surely, it is far-flung speculation for petitioners to anticipate that the decision below (which does not even purport to deal with the question of what can be done in a pending reorganization proceeding) is likely to have an impact (let alone a far-reaching impact) on pending reorganization proceedings.

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3. *(Continued)*
Court of Appeals "erred in holding that the reorganization court lacked the power to deal with future tort claims arising from preconsummation exposure" (Pet. 11), and that "[t]he central issue in these proceedings is . . . whether a reorganization court has the power to deal with future tort claims for latent asbestos-related injuries" (Pet. 12).

C. There Is No Conflict Among the Circuits.

No federal court of appeals has rendered a decision that conflicts with the decision in this case.

Petitioners seek to manufacture a pseudo-conflict by pointing to a recent decision by the Honorable Robert B. Krupansky, *In re Erie Lackawanna Railway*, No. B72-2838, slip op. (N.D. Ohio, June 18, 1985) (Pet. App. 62a-88a). Although Judge Krupansky is a member of the United States Court of Appeals for the Sixth Circuit, he was sitting by designation as a judge of the United States District Court for the Northern District of Ohio when he issued the opinion cited by petitioners. This Court's Rule 17 makes it clear that a conflict between a court of appeals decision and a district court decision in another circuit is not considered to be a conflict between the circuits. The fact that the district court decision was written by a judge now on a court of appeals does not mean that his decision, which has been appealed, will be affirmed by that court of appeals.

Trying another approach at uncovering a "conflict", petitioners come up with what they (and Judge Krupansky) appear to perceive as a conflict between the decision by the Court of Appeals for the Third Circuit in this case and that same court's decision in *In re Amatex Corp.*, 755 F.2d 1034 (3d Cir. 1985) (Pet. 7-8).[4] However, there is no conflict between the two decisions. In *Amatex*, the Third Circuit was considering the means by which potential future claimants might be protected in an ongoing reorganization proceeding governed by the Bankruptcy Code. In this case, the Third Circuit was faced with deciding what effect a reorganization consummated under the now-repealed Bankruptcy Act had

4. In a footnote on page 13 of their petition, petitioners state that they had been informed that a petition for a writ of certiorari would be filed in the *Amatex* case. The deadline for filing such a petition has now passed, and no petition has been filed.

had on potential future claimants. The court in each case expressly avoided saying anything that would present a conflict. In *Amatex*, the court stated that it did "not reach the merits" of the question of whether future claims could be discharged in reorganization proceedings. 755 F.2d at 1041. In this case, the court stated that it was not deciding "what provision in a reorganization plan, if any, could be made for future claims" (Pet. App. 17a n.1).

In any event, a conflict between two decisions of a single court of appeals is something that is appropriately handled by that court itself through its in banc procedure. In this case, a petition for rehearing in banc was submitted to the judges who participated in the unanimous decision below and to all of the other available judges of the circuit in regular active service, including the Honorable Arlin M. Adams (who authored the *Amatex* opinion) and the Honorable Collins J. Seitz (who was the author of the opinion below and also a member of the unanimous *Amatex* panel). Rehearing in banc was denied without dissent on April 26, 1985 (Pet. 60a-61a). Rehearing in banc was also denied in *Amatex* (on April 2, 1985).

Petitioners' strained effort at presenting "conflict" as a ground for review is unavailing.

D. There Is No Conflict with Any Decision of This Court.

The decision below does not conflict with any decision of this Court.

Petitioners cite two opinions of this Court, which they assert stand for the proposition that a bankruptcy court has the power to deal with a potential future claim at a time before the claim has technically "arisen" under the underlying substantive law (Pet. 9). However, neither of the cases cited by petitioners involved a tort claim; the cases involved claims based upon contracts in which, in contrast to this case, the identity of the claimants and

the nature and amount of their potential claims were easily ascertainable. This distinction makes the cases cited by petitioners inapplicable.

Both *Maynard v. Elliott*, 283 U.S. 273 (1931), and *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 849 (1915), involved the question of what constituted a provable contract claim under Section 63 of the Bankruptcy Act. In *Maynard*, the Court held that holders of promissory notes endorsed by the bankrupts had claims that were provable in the bankruptcy proceedings even though the promissory notes were not yet due when the bankruptcy petitions were filed. In *Williams*, the Court held that a surety had a provable claim when it had entered into a contract of indemnity with the bankrupts and knew the amount of payment demanded under the contract but had not yet made the indemnity payment when the bankrupts filed their petitions in bankruptcy. These cases neither conflict with nor undermine the validity of the Third Circuit's decision in this case.

Nor does the Third Circuit's decision conflict with the decisions of this Court interpreting Section 77 of the Bankruptcy Act that petitioners cite. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), the Court held that a court presiding over the reorganization of a railroad under Section 77 has jurisdiction over tax claims asserted against the railroad by a state and that the reorganization court has jurisdiction over all the debtor railroad's property, including property against which a state has asserted a lien for delinquent taxes. In *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway*, 294 U.S. 648 (1935), the Court held that the reorganization court can enjoin a note holder's sale of a railroad's property that has been pledged as collateral under notes containing a provision that authorizes the note holder to sell the property in the event of default if such

a sale could prevent the consummation of a plan of reorganization by the railroad. Both *Gardner* and *Continental Illinois* involved the equitable powers of the reorganization court in ongoing proceedings under Section 77. Neither opinion contains any statement that deals with, much less conflicts with, the ruling of the Court of Appeals in this case.[5]

E. The Decision of the Court of Appeals Is Correct.

Finally, this case was correctly decided by the Court of Appeals for the Third Circuit. The issue that the Court of Appeals had to address was whether, in dealing with reorganization proceedings under Section 77 of the now-repealed Bankruptcy Act in which (1) the reorganization court did not deal with potential claims for asbestos-related injuries that were not yet manifest, (2) no notice had been given to any of the potential claimants that their claims might be barred, and (3) the language of the discharge order did not specifically mention such claims, such claims should be deemed to have been discharged.

There were serious questions of due process. As the Court of Appeals pointed out, "the general rule is that all known creditors must receive personal notice" which would mean that "in our case, every employee who had worked near asbestos and whose address was known would be a known creditor; yet none received personal notice in the prior reorganization proceedings" (Pet. App. 17a). The Court of Appeals avoided "such thorny Constitutional issues" by making a fundamentally sound

5. Petitioners' related suggestion (Pet. 20-21), not raised below, that *Railway Labor Executives Ass'n v. Gibbons*, 455 U.S. 457, 468 (1982), could support a holding that F.E.L.A. actions cannot be asserted against Reading and CJI since they are no longer common carriers is groundless. Reading and CJI were common carriers when they allegedly negligently exposed their employees to asbestos. *See* 45 U.S.C. §51.

tort law decision, a decision that is fully supported by this Court's opinion in *Urie v. Thompson*, 337 U.S. 163 (1949).

The Court of Appeals held that an action for asbestos-related injury does not exist under F.E.L.A. before manifestation of the injury. In making that determination, the Court pointed out:

> If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do. Requiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered. Therefore we hold that, as a matter of federal law, F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury. (Pet. App. 13a-14a)

Petitioners do not, and cannot, quarrel with either the logic or the soundness of that analysis. Indeed, they do not even address it. Rather, what petitioners seem to be saying is that, even though plaintiffs would not have been able to assert claims under F.E.L.A. at the time of reorganization, those claims nevertheless should be considered to have been barred by a reorganization plan that did not provide for them, solely because they conceivably can be characterized as "other interests of whatever character" as that term was used in Section 77(b) of the Bankruptcy Act. Putting to one side that petitioners are seeking to benefit from having made no provision for

plaintiffs' claims during their reorganizations and the total callousness of the attitude that petitioners manifest towards their former employees — who have contracted illnesses because of exposure to asbestos during their work for petitioners — it is obvious that the Third Circuit's analysis of the law is correct. As the Court of Appeals pointed out in its decision, "before one can have an 'interest' which is cognizable as a contingent claim under Section 77, one must have a legal relationship relevant to the purported interest from which that interest may flow" (Pet. App. 15a).

> There is no legal relationship, however, between a tortfeasor and a tort victim until a tort actually has occurred. The tortfeasor-victim legal relationship arises simultaneously with the cause of action in tort. Since we have said that there is no tort under F.E.L.A. until injury manifests itself, it follows that there was no legal relationship between plaintiffs and defendants relevant to plaintiffs' future causes of action in tort from which an 'interest' could flow. (Pet. App. 15a)

The decision below is sound as a matter of logic and as a matter of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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